

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN

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ALVIN BALDUS, CINDY BARBERA, CARLENE  
BECHEN, RONALD BIENDSEIL, RON BOONE, VERA  
BOONE, ELVIRA BUMPUS, EVANJELINA  
CLEEREMAN, SHEILA COCHRAN, LESLIE W.  
DAVIS III, BRETT ECKSTEIN, MAXINE HOUGH,  
CLARENCE JOHNSON, RICHARD KRESBACH,  
RICHARD LANGE, GLADYS MANZANET,  
ROCHELLE MOORE, AMY RISSEEUW, JUDY  
ROBSON, GLORIA ROGERS, JEANNE SANCHEZ-  
BELL, CECELIA SCHLIEPP, TRAVIS THYSSEN,

Plaintiffs,

TAMMY BALDWIN, GWENDOLYNNE MOORE  
and RONALD KIND,

Intervenor-Plaintiffs,

v.

Members of the Wisconsin Government Accountability  
Board, each only in his official capacity:  
MICHAEL BRENNAN, DAVID DEININGER, GERALD  
NICHOL, THOMAS CANE, THOMAS BARLAND, and  
TIMOTHY VOCKE, and KEVIN KENNEDY, Director  
and General Counsel  
for the Wisconsin Government Accountability Board,

Defendants,

F. JAMES SENSENBRENNER, JR., THOMAS E. PETRI,  
PAUL D. RYAN, JR., REID J. RIBBLE,  
and SEAN P. DUFFY,

Intervenor-Defendants,

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**PLAINTIFFS' MOTION TO DEFER A JUDICIAL DECISION ON  
PENDING MOTION FOR JUDGMENT ON THE PLEADINGS  
FILED BY CONGRESSIONAL INTERVENOR-DEFENDANTS**

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Civil Action  
File No. 11-CV-562

Three-judge panel  
28 U.S.C. § 2284

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VOCES DE LA FRONTERA, INC., RAMIRO VARA,  
OLGA WARA, JOSE PEREZ, and ERICA RAMIREZ,

Plaintiffs,

v.

Case No. 11-CV-1011  
JPS-DPW-RMD

Members of the Wisconsin Government Accountability  
Board, each only in his official capacity:  
MICHAEL BRENNAN, DAVID DEININGER, GERALD  
NICHOL, THOMAS CANE, THOMAS BARLAND, and  
TIMOTHY VOCKE, and KEVIN KENNEDY, Director  
and General Counsel for the Wisconsin Government  
Accountability Board,

Defendants.

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The plaintiffs, by their counsel, Godfrey & Kahn, S.C., move the Court to defer a decision on the Rule 12(b)(6) and 12(c) motions filed by the Congressional Intervenor-Defendants. In support of their motion, the plaintiffs state that they and the Government Accountability Board (“GAB”) defendants have resolved, earlier today, the pending discovery dispute between them—with the defendants’ agreement to produce the GAB documents and materials related to the “anomalies” in the data on which Acts 43 and 44 are based. The plaintiffs further state, based on the declaration filed herewith, that those anomalies may well affect the population deviations and other data involving the state’s eight Congressional Districts. In addition, the plaintiffs further state:

### **GROUND**

1. Yesterday, the Congressional Intervenor-Defendants filed reply briefs (Dkt. 115, 116) concluding the briefing schedule on the Rule 12(b)(6) and (c) motions they had filed on December 8, 2011 (Dkt. 75).

2. Earlier today, the plaintiffs and the defendants reached agreement on the defendants' production of documents involving data anomalies in Acts 43 and 44. That agreement enables the plaintiffs to withdraw their motion for emergency hearing and order to show cause (Dkt. 112) and the defendants to withdraw their motion for a protective order (Dkt. 107), both filed on January 16, 2012. The parties expect to file a stipulation to this effect by tomorrow.

3. Earlier this week, on January 17, the plaintiffs took the deposition of Andy Speth, Congressman Paul Ryan's chief of staff, who was largely responsible for drafting the boundaries that became Act 44. From the deposition, the plaintiffs learned for the first time the factors that the actual drafter of what became Act 44 took into account in drawing the boundaries. The deposition transcript is not yet available.

4. The plaintiffs' principal expert witness, Dr. Kenneth R. Mayer, has concluded that the anomalies described in the defendants' memoranda of November 10, 2011 and January 13, 2012 raise—at the least—the possibility that the population deviations between and among the Congressional Districts are not *de minimis*. See Declaration of Dr. Kenneth R. Mayer ¶ 10. Under *Jefferson County Commission v. Tennant*, No. 2:11-CV-0989, 2012 U.S. Dist. LEXIS 569 (S.D. W. Va. Jan. 3, 2012), only a congressional redistricting plan with virtually no population deviation can withstand the “one person one vote” demands of Article I.

5. Until now, there has been no challenge to the new Congressional districts based on population deviations from precise equality, because—according to the data previously available—each of the eight Congressional districts has a population of 710,873 or 710,874. See Mayer Decl. ¶ 10 (“Because the absolute population deviation of the congressional districts in Act 44 was one person—as low as it could have been, given the population of the state and

number of congressional districts—I did not express any opinion about the character of that deviation. Had the absolute deviation been higher, I would have analyzed the deviation and likely expressed an opinion about it.”).

6. According to Prof. Mayer, “although the error rates remain unclear, at the congressional level, a shift of even a handful of persons could easily change the population deviation to unacceptable levels.” Mayer Decl. ¶ 10. That may lead to a need to amend the pending pleadings to allege the failure to achieve population equality. It also may affect, among other subjects, the population migration issues raised in the Second Amended Complaint.

7. A delay in the resolution of the Rule 12(b)(6) and (c) motions will not unduly prejudice the Congressional Intervenor-Defendants. The one individual with first-hand and hands-on knowledge of the development of Act 44 already has been deposed. By contrast, a delay that permits the plaintiffs to review the relevant documents—not yet produced by the defendants—and the deposition transcript of Mr. Speth would permit the Court to avoid a motion for reconsideration of an immediate Rule 12(b)(6) and (c) decision based on newly discovered (and produced) documents.

8. On information and belief, especially in light of *Tennant*, the litigation involving Act 44 would not be susceptible to a motion to dismiss or, at the least, it would be subject (as the plaintiffs already have argued) to conversion to a summary judgment motion.

### **RELIEF REQUESTED**

For the reasons stated above, the plaintiffs request that the Court defer a decision on the pending Rule 12(b)(6) and (c) motions for no less than 10 business days, subject to further extension for cause.

Dated: January 18, 2012.

GODFREY & KAHN, S.C.

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